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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 826

THE GREAT WESTERN FOOD DISTRIBUTORS, INC., NATHANIEL E. HESS AND CHARLES S. BORDEN,
Petitioners,

vs.

EZRA TAFT BENSON (SUCCESSOR TO CHARLES F. BRANNAN), SECRETARY OF AGRICULTURE, AND THOMAS J. FLAVIN, JUDICIAL OFFICER BY APPOINTMENT OF THE SECRETARY OF AGRICULTURE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DONNELLEY-GARRETT PRINTING COMPANY, CHICAGO

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered January 14, 1953.

OPINIONS BELOW.

The judgment of the Court of Appeals denied a petition filed by the petitioners to review and set aside an order of June 20, 1951, issued by the Secretary of Agriculture under Section 6b of the Commodity Exchange Act (7 U. S. C. A.,

sec. 9). The order appears in the record at pages 1407-1456. The opinion of the Court of Appeals appears in the record at page 1469 and is reported in 201 Fed. 2d 476.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 14, 1953 (R. 1481). Petition for rehearing filed January 29, 1953 (R. 1482) was denied February 24, 1953 (R. 1483). The jurisdiction of this court is invoked under 28 U. S. C. A., sec. 1254(1).

QUESTIONS.

1. The case involves a determination of the elements constituting a "corner" of a "commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade," under Section 9 of the Commodity Exchange Act (7 U. S. C. A., sec. 13), which does not specifically define the phrase:

   a. The court stated that "we find what we consider fatal deficiencies in the government's theory," in that "this finding that the prices of refrigerator eggs and their futures were abnormally high in view of the supply and demand situation cannot be said to be sustained by the weight of the evidence." It being conceded by the Government that an abnormal price imposed by a cornerer is an essential element of a corner under the Commodity Exchange Act, and the court having found that the Government failed to sustain its charge that prices were abnormally high in view of the existing supply and demand situation, may prices be considered abnormal merely because certain price relationships differed from the average of other years, during which prices and market conditions varied substantially?

   b. In determining whether a person cornered a commodity in interstate commerce or for future delivery

on a board of trade (Chicago Mercantile Exchange) under the Commodity Exchange Act, is it proper to exclude the entire available supply of the commodity located outside the city of Chicago where the board of trade was located, it appearing,

(i) that the rules of the board of trade permit delivery of the commodity whether such commodity is located in Chicago or elsewhere in the United States,

(ii) that the board of trade is national in scope and is the only important board in the United States for trading of such commodity, that traders located throughout the United States trade on the board, and that the commodity stored throughout the United States is hedged on the board,

(iii) that the rules as to delivery were filed pursuant to statute with the Secretary of Agriculture who voiced no objection thereto, and

(iv) that trading is conducted in reliance upon such rules of the board of trade, and, customarily, the open futures commitment greatly exceeds the amount of the commodity stored in Chicago?

c. Even if it be assumed that only the commodity stored in Chicago constitutes the deliverable supply, can a person be said to have cornered the market merely because some of the shorts would have to purchase from such person, where at all times a majority of the shorts, ranging from 52% to 98%, could have liquidated their position without recourse to such person?

d. Can a corner exist in the absence of withholding of the commodity by the alleged cornerer from the market, the court having made no finding of any withholding?

2. The Commodity Exchange Act differs from the Administrative Procedure Act in providing that the findings of the Secretary of Agriculture must be "supported by the weight of the evidence." The question is whether the court

is required to weigh the evidence to determine where the "weight of the evidence" lies, or whether the court was correct in stating that its function was not to reweigh the evidence to ascertain in which direction it preponderates, but "rather to review the record with the purpose of determining whether the finder of fact was justified, *i. e.*, acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings."

STATEMENT.

The Secretary of Agriculture issued a complaint under Section 6b of the Commodity Exchange Act against The Great Western Food Distributors, Inc. and its officers charging that during December 1947, they attempted to manipulate the price of eggs in interstate commerce and for future delivery on the Chicago Mercantile Exchange and attempted to corner and did corner such eggs (R. 2). Answers were filed denying the charges (R. 11-17). After a hearing before a referee, the judicial officer appointed by the Secretary of Agriculture entered an order on June 20, 1951, directing that Great Western, Nathaniel Hess, its president, and Charles S. Borden, manager of the Chicago office, be denied all trading privileges on all contract markets for a period of one year (R. 1456). The Court of Appeals sustained the decision of the judicial officer that Great Western cornered the egg market in December 1947, and denied the petition to set aside the order.

The Chicago Mercantile Exchange is a contract market under the provisions of the Commodity Exchange Act, and functions as a board of trade for the purchase and sale of eggs and other commodities for immediate and future delivery. It is national in scope, and is the only important

market in the United States for trading in egg futures. National factors are always reflected on the Exchange. Traders throughout the United States trade on the Exchange, and eggs stored all over the country are hedged on the Exchange. During 1947, egg futures contracts equivalent to more than half the nation's egg crop were traded on the Exchange (R. 29, 446, 467, 481, 492, 505, 512, 734; Res. Ex. 4, R. 1268; Res. Ex. 43, R. 1332).

A "futures contract" is one for the sale and delivery of a commodity in a specified month, and is identified by the name of the month in which delivery is to be made. Thus, a contract for the delivery of eggs in the month of December is referred to as a December future. The buyer under a futures contract is referred to as a "long" and the seller as a "short" (R. 30-31). The "short" has the option to deliver at any time during the month specified in the futures contract, and the "long" is obligated to accept delivery when tendered (R. 38, 136). Most contracts, however, are not liquidated by delivery of the commodity, but by offsetting futures purchases or sales on the Exchange (R. 32-33). The term "open commitment" refers to the total number of futures contracts on the Exchange which have not yet been completed by offset or delivery (R. 31-32).

The trading unit was a lot (in trade parlance a "car") of 600 cases of eggs, 30 dozen to the case (R. 35; R. 1105-1106, Rules 1403, 1405e). Futures trading in the December 1947 futures ended December 23 (R. 45).

Under the rules of the Chicago Mercantile Exchange, delivery on futures contracts could be made as follows: (1) Refrigerator (storage) eggs in approved warehouses in Chicago could be delivered at any time during the delivery month. (2) Refrigerator eggs in approved warehouses outside Chicago could be delivered with an allowance of ¾ of

a cent per dozen plus actual freight from point of storage to Chicago, to be made not later than 9:00 A. M., December 22. (3) Fresh eggs on track or in approved warehouses in Chicago were deliverable at any time during the delivery month (R. 40-41, 44-46; R. 1107, Rules 1405f and h).

Out-of-town eggs need not be brought to Chicago. Delivery is effected merely by transfer of the warehouse receipt (R. 1104, Rule 1004; R. 38-39).

Pursuant to statute, the rules of the Exchange had been filed with the Secretary of Agriculture (R. 443, 449).

The Government contends that Great Western maintained a corner from December 3 to December 23, 1947 (Gov't Brief in C. A., p. 33, and table, p. 8). To support its contention, the Government argued and the court agreed that notwithstanding the rules of the Chicago Mercantile Exchange, only Chicago storage eggs can be considered to be the available supply for delivery on futures contracts.

Petitioner, Great Western, dealt in both egg futures and actual eggs (generally referred to as "cash eggs"). It commenced the month of November 1947, with an inventory of 87 cars, and sold a total of 83 cars during that month (R. 1242-1243, Gov. Ex. 37; R. 1336, Res. Ex. 48). On December 3, Great Western replenished its inventory by the purchase of 71 cars, with a resultant inventory of 81 cars. This was in conformity with the November sales and with its current requirements, since at that time its sales of cash eggs were approximately 25 cars weekly. In the latter half of December, Great Western received delivery of 53 cars on its futures contracts, so that it ended the month of December with 82 cars (R. 1125, Gov. Ex. 9; R. 1137, Gov. Ex. 16; R. 1243-1245, Gov. Ex. 37).

The uncontradicted evidence, by respondents' own witness, is that Great Western's inventory could not be considered much of an inventory (R. 201).

Eggs start going into storage in February, and the peak is reached in July and August. Then the eggs start going out of storage, and the supply is completely exhausted by the end of January. December, accordingly, is near the tail end of the storage season; and on December 31, 1947, the storage stocks were only 4% of the August 1 supply (R. 186, 199; R. 1268, Res. Ex. 4; R. 1267, Res. Ex. 3). Furthermore, the December 1947 storage stocks were the smallest on record except for one year (R. 1330, Res. Ex. 41; R. 684). On the other hand, the production of fresh eggs in December 1947 was greater than any prior year except one, being 10,363,000 cases, equivalent to 17,271 cars, of which almost two-thirds is produced in the Middle West (R. 1261, Gov. Ex. 51; R. 666-667, 800, 930).

Great Western started trading in December 1947 futures on October 29, 1947 and developed a long position in that future, reaching its largest position of 292 cars on December 2, 1947. At that time, the open commitment was 740 cars, so that Great Western's holdings were 39% of the open commitment (R. 1117). Thereafter Great Western's position decreased. At the same time, Great Western traded in January 1948 futures, wherein it maintained a short position substantially equal to or greater than its December 1947 long position (R. 1117, Gov. Ex. 4; R. 1331, Res. Ex. 42). The purchase of the futures of one month and the sale of a like number of futures of a succeeding month constitute a "spreading" transaction, a well recognized method of trading which performs an important economic function. 7 U. S. C. A., Sec. 6a(1); Federal Trade Commission, *Report on Grain Trade*, Vol. 7, pp. 77, 80. Of the 292 cars of futures on December 2, Great Western received delivery of only 53 cars. The rest were offset (R. 1123, Gov. Ex. 7).

The Court of Appeals found that the Government failed

to prove that prices were abnormal in relation to the supply and demand conditions then existing (R. 1477). Trading in December futures opened on September 2, 1947, and the price was 53.50 cents per dozen on that day. Thereafter prices fluctuated from day to day, with a high of 57.60; and on December 1, it was again 53.50 cents. On December 3, the day the alleged corner began, it was 53.60 cents. The prices then fluctuated from day to day as they did prior to December, with a high of 56.25 cents, and a low of 50.50 cents, and ending at 53.50 cents on December 23 (R. 76; R. 1100, Gov. Ex. 1; R. 1308, Res. Ex. 30).

Great Western filed daily reports of its futures trading with the Commodity Exchange Authority so that the Government always had full knowledge of Great Western's futures position and receipt of deliveries on its futures (R. 53-54, 72-73, 131-132, 151-152, 156, 642-645; R. 1271, Res. Ex. 6; R. 1290, 1292, Res. Ex. 11, 15). Two observers of the Commodity Exchange Authority in daily attendance on the floor of the Chicago Mercantile Exchange reported no unusual occurrences in the way of trading practices, price movement, slowness in reduction of open contracts, or any other thing worthy of note (R. 54, 59, 222, 144). Great Western's cash eggs were offered for sale at all times during December; there were sales of 61 cars of cash eggs, and Great Western's holdings were known in the trade (R. 193-194, 468, 640; R. 1125, Gov. Ex. 9; R. 1164, 1189, 1190, 1192, 1194, 1196). There is no charge of conspiracy, deceit, trickery, concealment, false rumors or other form of fraud. See *General Foods Corp.* v. *Brannan,* 170 F. (2d) 220, 224.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is the first and only decision upholding the existence of a corner under section 9 of the Commodity Exchange Act (7 U. S. C. A., sec. 13). It affects trading on every board of trade in the commodities of wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Irish potatoes, and wool tops (7 U. S. C. A., sec. 2), which constitute a large portion of the agricultural commodities of the nation.

In concluding that a corner existed, the opinion of the court disregards the language of the Commodity Exchange Act, section 9, and is inconsistent with the definition of a corner accepted by this Court in *U. S.* v. *Patten,* 226 U. S. 525, 539-540, and by the recognized authorities.

The opinion of the Court of Appeals is also inconsistent with basic principles relating to corner and manipulation cases established by a different panel of the court in *General Foods Corp.* v. *Brannan,* 170 F. 2d 220.

The great importance of the issues in this case in the administration of the Commodity Exchange Act has been admitted by the Government in oral argument before the Court of Appeals. The issues are also of great importance to all boards of trade and traders throughout the country. To what extent may they rely upon the rules of a board of trade duly adopted and filed with the Secretary of Agriculture without objection? When does trading run afoul of the Commodity Exchange Act? Are prices to be deemed abnormal even though they are not abnormal in view of the supply and demand situation? The importance of the issues require an authoritative construction of Section 9 of the Commodity Exchange Act by the highest court.

I.

The Court of Appeals said that "we find what we consider *fatal* deficiencies in the Government's theory," because the finding of the judicial officer "that the prices of refrigerator eggs and their futures were abnormally high in view of the supply and demand situation cannot be said to be sustained by the weight of the evidence." (Wherever emphasis appears in quoted material, such emphasis is supplied.)

This fatal deficiency in the Government's case required the Court of Appeals to set aside the order of the judicial officer. An abnormal price is an essential element of a corner. *United States* v. *Patten*, 226 U. S. 525, 539-540; *General Foods Corp.* v. *Brannan*, 170 F. (2d) 220, 230; *Secretary of Agriculture* v. *General Foods Corp.*, C. E. A. Doc. No. 34.

The Government conceded in its brief (p. 82) before the Court of Appeals "that the Government must prove manipulation as an essential element of a corner," and further conceded that "in order to prove manipulation in this case, it is only necessary to prove that Great Western caused the price of refrigerator eggs in Chicago or December futures to be higher than they would have been if only the forces of supply and demand were operative." The Government's expert witness, Dr. Beach, stated in defining a corner, that an abnormal price means that it is "not one determined by competitive supply and demand conditions" (R. 359).

Although the Court of Appeals found that the Government failed to prove that prices were abnormally high in view of the supply and demand situation, a failure which the Court said was a fatal deficiency, the Court resurrected the dead with the conclusion that prices were abnor-

mal because certain price relationships differed from the average of other years.

The first relationship was the spread or difference between December 1947 and January 1948 futures. The Court of Appeals stated that from 1932 to 1948, December prices averaged 103.3% of January prices, and that in 1947, this ratio was 112.4% (R. 1478). The court overlooked the fact that the average of prior years conceals a range from approximately 98% to 117.9% and that the percentages varied from year to year (R. 1309, Res. Ex. 30; R. 1258, Gov. Ex. 48). Each year is governed by the supply-demand situation of that year, and the prices during December 1947 were governed by the supply-demand situation then existing, and not that of other years.

The second relationship declared to be abnormal was that the price of December 1947 futures was abnormally high in relation to the price of fresh eggs at the close of trading (R. 1479). The fresh egg price was 0.5 cents over December 1947 futures price, compared to an average of 4 cents during 1932-1947. Here again the average conceals the range from 1.85 cents to 7 cents, and the further fact that in 3 years (1932, 1941, 1949) the futures prices even exceeded the fresh egg prices (R. 1236, Gov. Ex. 32; R. 1337, Res. Ex. 49). In January 1948, which involved the same storage season, the fresh egg price was 0.65 cents over the futures price, just about the same as in December 1947 (R. 1253, Gov. Ex. 43).

The court also held that during 14 years a precipitous drop in fresh egg prices was reflected by a drop in futures prices in all instances except six. Since the year 1947 failed to conform to the pattern during 8 years, although it conformed to the pattern during 6 years, the court concludes the situation was abnormal. By the same reason-

ing the relationsip during each of the 6 years would also be abnormal.

The evidence is uncontradicted that price relationships depend on the current market situation, and that no two years are alike (R. 709, 499). Since prices, price ratios and market factors vary radically from year to year, no sound or reliable deduction can be drawn from a mere comparison with prior years (R. 681). As the judicial officer stated in another connection (R. 1445):

> "Moreover the price ratios for other years vary radically, and no sound or reliable deductions as to the appropriate level for December futures prices can be drawn from this type of evidence."

The Court of Appeals found that the Government failed to prove that prices were abnormally high in view of the supply and demand situation in December 1947. Certainly, prices cannot be declared abnormal for failure to conform with price ratios of other years, which reflect the supply and demand situations prevailing in those respective years.

In our petition for rehearing we pointed out that the price relationships during the war and post-war years differed from those of prior years, and more closely resembled those of 1947, and that was another reason why comparison with prior years was unwarranted (Petn., pp. 7-11). The price data for the later years was not in evidence because the hearing was concluded prior thereto, but reference was made to accepted market reports. Respondents answered that the prices in these later years were also abnormal because of activities of the same nature as the activities of the petitioners in this case (Reply, p. 9). It is improbable that the market would be in a continual state of "corner", and respondent's answer merely emphasizes the importance of a review by this Court.

II.

The Court of Appeals has overlooked the basic features of a corner in other respects.

A. In the administrative hearing, the Government defined a corner under the Commodity Exchange Act as "the purchase and holding of a large and controlling long position in a future, *together with the acquisition and withholding from sale of all or a dominant portion of the deliverable cash supply,* for the purpose of manipulating the price" (Gov. Br., p. 32). This definition is substantially correct, and is supported by the authorities. In its brief to the Court of Appeals, however, the Government receded from this position and for the first time contended that a corner may exist whether or not the cornerer acquires or withholds any of the cash commodity from sale (Br., pp. 13, 52-53, 75). The Court of Appeals agreed with the Government's revised contention.

Respondents are charged with violation of Section 9 of the Commodity Exchange Act, which reads:

> "Any person who shall * * * manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner *any such commodity,* * * * shall be deemed guilty of a misdemeanor" etc. (Emphasis added.)

Accordingly, the Act forbids the corner of (a) any commodity in interstate commerce, and (b) any commodity for future delivery on or subject to the rules of any board of trade. We fail to understand how one may corner a commodity without acquiring such commodity.

That the control of a commodity is a basic element of a corner is recognized in the authoritative definitions ac-

cepted by the judicial officer and all parties. The definition in *U. S.* v. *Patten*, 226 U. S. 525, 539-540, includes "control of all or the dominant portion of a commodity." The definition of S. S. Huebner in the *Encyclopedia of Social Sciences* includes "possession of all or substantially all of a given commodity * * * available for delivery upon the outstanding contracts of short sellers" (R. 1448).

B. As these definitions indicate, a corner involves the control of all or the dominant portion of a commodity. In supporting the Government's contention that a corner existed, the court upheld the Government's assertion that only storage eggs in Chicago warehouses are to be considered part of the deliverable supply, and that all storage eggs outside Chicago and all fresh eggs are to be excluded. It is evident that petitioners cannot be accused of cornering eggs in interstate commerce unless all the eggs in interstate commerce are considered. The Government accordingly concentrates on the charge that petitioners cornered eggs "for future delivery on or subject to the rules of any board of trade."

The question then arises—what eggs are available for future delivery? The rules of the Chicago Mercantile Exchange provide that Chicago storage eggs, out-of-town storage eggs and fresh eggs are deliverable upon futures contracts. We pointed out that the Chicago Mercantile Exchange is a national market and is the only egg futures market of any importance, and that eggs stored all over the country are hedged on this market. Pursuant to the statute, the rules of the Exchange were filed with the Secretary of Agriculture who presented no objections thereto. The Commodity Exchange Act requires all Exchanges to adopt rules "for the prevention of manipulation of prices and the cornering of any commodity", and provides for the suspension or revocation of a license of any Exchange

which fails to comply with the requirement" (7 U. S. C. A., sec. 7(d) and 8).

Trading on the Exchange is influenced by the fact that out-of-town storage eggs and fresh eggs may be delivered on futures contracts; and accordingly the open futures commitment is generally greatly in excess of the storage eggs in Chicago (R. 478, 487, 503, 512, 187, 239, 177-8, 198).

The weakness of respondent's position, adopted by the court, is demonstrated by a simple illustration. If the owner of ten cars of eggs in Milwaukee sells ten cars short on the Exchange for December delivery, and if Great Western bought these ten contracts, then in accordance with the court's decision, Great Western should be charged with ten longs in determining the size of Great Western's futures position, but the ten cars of Milwaukee eggs are not part of the deliverable supply even though they are deliverable under the rules of the Exchange. Repeat this illustration manyfold and the inequity of the court's ruling becomes oppressive.

Great Western did not own any of the out-of-town eggs, and these eggs could have been procured for delivery on futures contracts, if the shorts so desired, in a free competitive market. The Government charges it would have been more costly to deliver out-of-town eggs. There is no proof whatever in the record as to the prices of out-of-town eggs, except for one reference that fresh eggs were being offered out of Kansas for Chicago delivery at 2¢ under the Chicago price (R. 1189). Whether the cost of delivering out-of-town eggs was greater or less than that of eggs in Chicago is not the question. It is not the purpose of the Commodity Exchange Act to assure that all shorts may acquire their eggs at the same uniform price, or to guarantee that the shorts shall trade at a profit. The law seeks merely to prevent manipulated prices. So long

as out-of-town eggs are readily available at normal competitive prices, such eggs are part of the deliverable supply. The same reasoning applies to fresh eggs.

The court sustained the Government's contention that out-of-town eggs should not be considered because they are not delivered as frequently as Chicago eggs. That fact does not eliminate out-of-town eggs as part of the deliverable supply. More than 95% of futures contracts are liquidated by offset and not by delivery; and it may be argued with the same illogic that all eggs should be eliminated because deliveries are not as frequent as offsets. Out-of-town storage eggs were delivered in substantial quantities in the prior year 1946, and out-of-town eggs were also delivered in October, 1947 as well as December, 1947 (R. 1269, Res. Ex. 5A).

The Act prohibits a corner of any commodity "for future delivery on or subject to the rules of any board of trade". The deliverable commodity is determined by the rules of the board of trade filed with the Secretary of Agriculture. The Government and the court have simply disregarded the rules.

The holding of the Court of Appeals is contrary to the decision in *General Foods Corp.* v. *Brannan*, 170 F. 2d 220, which was rendered by a different panel of judges of the same court. In that case respondent was charged with cornering the Chicago rye market. The court, in reversing the finding of the judicial officer that there had been an attempt to corner the market, stated that the rye in other cities must also be considered, and that there was no proof that respondent controlled or attempted to control any of the rye in these cities (p. 228). The same view is expressed by G. W. Hoffman, consulting economist to the U. S. Department of Agriculture, in his book *Futures Trading upon Organized Commodity Markets* (1932), page 307.

III.

The withholding of the cash commodity from sale by the alleged cornerer is an essential element of a corner. By gaining control of all or substantially all of the deliverable supplies and then withholding such supplies from sale, the cornerer renders it impossible for the shorts to obtain supplies to fulfill their contracts. This court stated in *U. S.* v. *Patten,* 226 U. S. 525, 540, that an essential element of a corner is "a withholding from sale, without which, it is conceded by both parties, the market could not be cornered."

Though petitioners vigorously urged that the record fails to show any withholding from sale, the Court of Appeals is silent on the question, and upheld the existence of a corner even though it did not find a withholding from sale.

IV.

After the court ruled that only Chicago storage eggs could be considered the available supply, the court then held that Great Western potentionally controlled the market, because with the elimination of the out-of-town supplies and fresh eggs, a number of shorts would have been compelled to go to Great Western to liquidate their contracts. As previously stated, a short may liquidate his contract by offset or delivery. Accordingly, his recourse is to the longs in the futures market, plus the cash supply. At all times during the period in question, even on the assumption that only Chicago storage may be considered, a majority of the short contracts could have been liquidated without recourse to Great Western. On December 3rd when Great Western held its largest position, 98% of the short contracts could have been liquidated without recourse to Great Western. A week later, on December 10,

the percentage was 79%. A week later on December 17, the percentage was 66%. On the last day of the alleged corner, December 23, the percentage was 66% (R. 1239, Gov. Ex. 35).

This is not the control of "all" or "substantially all" or the "dominant portion" which the authorities include as an essential element of a corner. Furthermore, during this period Great Western did not increase its holdings after December 3, but on the contrary reduced them. Apparently a trader is to be free from the charge of cornering the market only if he has a commodity which no one else needs, but if he has merchandise that some one else needs, even though a majority can satisfy their needs elsewhere, he is to be charged with cornering the market.

With the inclusion of storage eggs outside Chicago as part of the deliverable supply, all short contracts could have been liquidated without recourse to Great Western (R. 1267, Res. Ex. 3; R. 1239, Gov. Ex. 35). The same was true if fresh eggs were included.

The Court of Appeals referred to the fact that Great Western's percentage of holdings increased. As we shall show, this increase was not due to any increase in Great Western's holdings, but to the fact that the reduction in Great Western's holdings was not as rapid as the aggregate reduction of all other traders. Of course, Great Western was not bound to liquidate in proportion to the liquidation of the rest of the market, and had a right to trade in accordance with its own judgment and estimate of the market. The judicial officer in the *General Foods* case, CEA Docket 34, stated that "the holding of a large supply of rye by General Foods was not in itself prohibited, nor was its failure to liquidate the stock or part of it in such way as to make rye available to elevators or other speculative interests." This position was upheld by the court in the *General Foods* case, 170 F. 2d 220, 231.

On December 3, Great Western's inventory of cash eggs was 81 cars, which was only 29% of the storage eggs in Chicago warehouses, only 12% of the storage eggs in ten lead. g markets, and an even smaller percentage of the storage eggs in the United States. Thereafter during the period of the alleged corner, Great Western's inventory declined as sales were made. The increase in percentage after December 3 was not due to increased inventory, because Great Western's inventory actually decreased. On December 17, it was down to 49 cars. Thereafter there was some increase because some of the shorts made deliveries on their contracts. On December 23, when the Government concedes the alleged corner ended, Great Western's inventory was 65 cars, which was 56.0% of Chicago storage stocks and 28% of the storage stocks in the ten markets. The percentage increased only because the overall storage supplies were decreasing and some of the shorts made deliveries to Great Western on their futures contracts. Furthermore, these percentages relate to the storage supply at the tail end of the season, and in a year in which the storage stocks were the smallest on record except for one year. When the supply of fresh eggs is considered, Great Western's holdings were only a minute fraction of 1% (R. 1125, Gov. Ex. 9; R. 1130-1132, Gov. Ex. 13; R. 1267, Res. Ex. 3).

Likewise the increasing percentage in the futures holdings was not due to any increase in Great Western's holdings. When Great Western reached its highest point of 292 cars on December 2, it was 39% of the open commitment. When its position was reduced to 25 cars on December 23, that represented 96% of an open commitment of 26 (R. 1117, Gov. Ex. 4; R. 1331, Res. Ex. 42).

Under the Commodity Exchange Act, authority is vested in Government to place limits upon trading (7 U. S. C. A., par. 6a), but this authority had not been exercised; and

petitioners are not charged with violating any trading limits.

In the *General Foods* case, 170 F. 2d 220, the court noted that the Government offered no proof "that any short in the Chicago rye market during the relevant period was in need of actual rye for delivery or other purposes or was pressured, coerced or injured by any action taken or contemplated by any of the petitioners." The same failure of proof exists in this case. The Government did not produce any evidence that any shorts desiring eggs for delivery were unable to obtain same. The Government did not produce any shorts who were pressured, coerced or injured by any action taken by the petitioners.

In the *General Foods* case, the court stressed the point that the Government's case was weakened in that no evidence of any attempt to manipulate the market was discernible by the Government's own experienced observers while the trading activities were in progress. The same situation existed in the instant case, but was completely ignored by the court.

V.

The standard of review under the Commodity Exchange Act differs from that under other Acts. Whereas under the Administrative Procedure Act the court is directed to set aside an administrative order if "unsupported by substantial evidence" (5 U. S. C. A., Par. 1009(e)), the Commodity Exchange Act requires that the findings of the Secretary of Agriculture be "supported by the weight of evidence" (7 U. S. C. A., sec. 9).

In *General Foods Corporation* v. *Brannan*, 170 F. 2d 220, 223-4 (C. A. 7), the court held that "the standard to be employed is something other than the 'substantial evidence rule' controlling in the review of other administrative orders," and "that petitioners are entitled to have the order

vacated unless this court concludes that it is sustained by the weight of the evidence, and to us that means the preponderance or greater weight."

In the instant case, the court held contrary to the ruling in the *General Foods* case and stated "that the function of this court is something other than mechanically reweighing evidence to ascertain in which direction it preponderates," but rather to determine whether the finder of the fact "acted reasonably in concluding that the evidence * * * supported his findings." The cases cited by the court in support of its interpretation arose under National Labor Relations Act which is similar in language to the Administrative Procedure Act and differs from the Commodity Exchange Act.

The court also accepted certain findings of the referee on conflicting evidence as if such findings were conclusive because the examiner heard and saw the witnesses. The rationale of its argument is contrary to the conclusion of this court in *Universal Camera Corp.* v. *N. L. R. B.* (1951), 340 U. S. 474, 496, wherein it was held:

> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve."

If review is granted, we propose to discuss the evidence to show that the evidence fails to support certain findings of the referee.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE L. SIEGEL,
BERNARD TOMSON,
Counsel for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 826

THE GREAT WESTERN FOOD DISTRIBUTORS, INC., NATHANIEL E. HESS, AND CHARLES S. BORDEN, PETITIONERS

v.

EZRA TAFT BENSON (SUCCESSOR TO CHARLES F. BRANNAN), SECRETARY OF AGRICULTURE, AND THOMAS J. FLAVIN, JUDICIAL OFFICER BY APPOINTMENT OF THE SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 1469-1481) is reported in 201 F. 2d 476. The findings of fact, conclusions of law, and order of the Judicial Officer [1] of the United States Department of Agricul-

[1] The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated (10 F.R. 13769) under the Act of April 4, 1940, c. 75, 54 Stat. 81, 5 U.S.C. § 516a *et seq.*

ture (R. 1407-1456) are reported in Agriculture Decisions, Vol. 10, pp. 783-829.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 14, 1953 (R. 1481). A petition for rehearing was denied February 24, 1953 (R. 1483). The petition for a writ of certiorari was filed May 23, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Charles F. Brannan, then Secretary of Agriculture, was a respondent in this case in the Court of Appeals (R. 1458). To date, there has been no substitution of his successor, Secretary Ezra T. Benson.

QUESTIONS PRESENTED

The basic issue is whether the record supports the ultimate finding that The Great Western Food Distributors, Inc. (hereinafter referred to as "Great Western"), cornered the December 1947 refrigerator egg futures market on the Chicago Mercantile Exchange. This presents the following subsidiary questions:

1. Whether the record supports the finding that Great Western acquired a large and controlling long position in the December 1947 refrigerator egg futures market by means of its transactions in refrigerator eggs and egg futures.

2. Whether the record supports the finding that, during the period involved in this case, refrigerator eggs stored in warehouses outside of Chicago were

not available to the shorts, because (a) there was an economic impediment, at all pertinent times, to the delivery of out-of-town refrigerator eggs, and (b) because such eggs could not, under the rules of the Exchange, be delivered on (or after) the crucial last two days of trading when Great Western substantially liquidated its large and controlling long futures position.

3. Whether the record supports the finding that Great Western compelled the cornered shorts to settle their December 1947 refrigerator egg futures contracts with Great Western at a manipulated, *i.e.,* artificially high, price.

STATUTE INVOLVED

The pertinent provisions of the Commodity Exchange Act (Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by the Act of June 15, 1936, c. 545, 49 Stat. 1491, as amended, 7 U.S.C. § 1, *et seq.*) are set forth in Appendix A, *infra,* pp. 18-21.

STATEMENT

This proceeding had its origin in a complaint issued by the Secretary of Agriculture pursuant to § 6(b) of the Commodity Exchange Act (7 U.S.C. § 9), charging, *inter alia,* that Great Western cornered the December 1947 refrigerator egg futures market on the Chicago Mercantile Exchange. The complaint alleged that, as a result of its transactions in egg futures contracts and refrigerator eggs, Great Western "placed itself in a position where it could and did demand such price as it saw fit from those who had sold December 1947 egg

futures contracts" (R. 7), and that Great Western's corner was consummated by Nathaniel E. Hess, Vice-President of Great Western, and by Charles S. Borden, in charge of Great Western's Chicago office (R. 3-4). Petitioners were directed by the complaint to show cause why their trading privileges should not be revoked or suspended (R. 8).

On the basis of the evidence introduced at the administrative hearing, the hearing examiner[2] entered detailed findings, including the ultimate finding that Great Western cornered the December 1947 refrigerator egg futures market on the Chicago Mercantile Exchange (R. 1339-1369). The Judicial Officer of the United States Department of Agriculture made substantially similar findings (R. 1416-1430), stated his conclusions (R. 1430-1456), and promulgated an order (R. 1456) directing all contract markets to deny all trading privileges to petitioners for a period of one year. On appeal to the Court of Appeals for the Seventh Circuit the order was affirmed, the court holding that "a review of the entire record is convincing that the greater weight of the evidence sustained the Referee and Judicial Officer in their conclusion that petitioner Great Western had cornered the egg market on the Chicago Mercantile Exchange in December 1947" (R. 1480).

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[2] The examiner is referred to as a referee in the Commodity Exchange Act, but his appointment and functions are under the Administrative Procedure Act.

The underlying facts are as follows:

Great Western is registered, under the provisions of the Commodity Exchange Act, as a futures commission merchant with membership trading privileges on the Chicago Mercantile Exchange. Nathaniel E. Hess is the company's vice-president (R. 3, 11) and, during the period involved in this case, "set the policy for all buying and selling of Great Western" (R. 548). Charles S. Borden is in charge of the Chicago office of Great Western and, at all critical times, executed the trading orders received from Hess (R. 601-602).

The trading unit in December 1947 egg futures was a contract for 600 cases, 30 dozen eggs to the case (*i.e.,* 18,000 dozen eggs), commonly referred to as one carlot (R. 35). The contract was a refrigerator egg contract, par delivery thereunder consisting of *refrigerator* eggs, grading U.S. No. 2 extras, originally stored during any month in 1947 in an approved warehouse *in Chicago* and continuously maintained in such storage thereafter (R. 42, 1107).

Under the pertinent Exchange rule (R. 45), trading in December egg futures terminated on December 23, 1947. Refrigerator eggs *in Chicago* were deliverable, however, in satisfaction of contractual obligations, until the last business day of the month, *i.e.,* December 31, 1947 (R. 42-45, 1123).

The Exchange rules precluded physical delivery in Chicago of refrigerator eggs originally stored in warehouses outside of that city, since they provided that refrigerator eggs, to be "deliverable", must

be continuously stored in the warehouse where originally stored (R. 40-45, 443, 1107). A party who had contracted to deliver under a December 1947 egg futures contract could satisfy his obligation by tendering a warehouse receipt for eggs physically located at an out-of-town warehouse. This, however, was subject to two important qualifications: (1) such delivery entailed a penalty of approximately $315 per contract; (2) the tender was required to be made prior to the last two days of trading on the Exchange, *i.e.*, before the opening of trading on December 22, 1947.[3] R. 40-45, 142, 771. Accordingly, on the last two days of trading (days when Great Western liquidated the bulk of its holdings, see *infra*, pp. 7-8), out-of-town refrigerator eggs were not available on any terms to shorts (R. 771).

The Exchange rules also permitted the substitution of fresh eggs,[4] located in Chicago, for refrigerator eggs in satisfaction of obligations incurred under refrigerator egg contracts. But, under the rules, the short would receive no premium for delivering fresh, in lieu of refrigerator, eggs (R. 43-44, 1107), although, in the month of December, fresh eggs normally sell at a very substantial premium over refrigerator eggs.[5]

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[3] The trading day was from 9:20 A.M. until 12:00 Noon (R. 1133-1136).

[4] Fresh eggs are defined in the Exchange rule as eggs which have not been in cold storage more than 29 days (R. 1105).

[5] In December 1946, fresh eggs in Chicago sold for an average of 12.8¢ per dozen more than refrigerator eggs in Chicago (Gov. Ex. 50, R. 1260, 1089), a difference of $2304 per carlot. On December 12, 1947, with 7 trading days remaining in December egg futures, fresh eggs in Chicago were selling at 7.25¢

On December 1, 1947, Great Western held 272 long December refrigerator egg futures contracts, or 33.3% of the total number of such contracts open on the Chicago Mercantile Exchange. At the close of trading on December 18, with 3 trading days remaining, Great Western held 221 of the 336 long contracts (65.8%). The following day, the figure had advanced to 179 out of 235 long contracts (76.2%). At the close of trading on December 22, with one trading day remaining, the figure stood at 113 out of 153 long contracts (73.9%) (Gov. Ex. 4, R. 1117, 98). The principal witness for petitioners conceded that Great Western's position in the futures market was a "large" one (R. 660, 714). During the last two days of trading, Great Western substantially liquidated its December futures position, reducing its long holdings by 154 contracts (Gov. Ex. 4, R. 1117, 98).

Great Western's position in actual or cash eggs (as distinct from futures) also increased steadily during the month of December 1947. On December 1, Great Western owned 5.7% of the total stock of refrigerator eggs in Chicago. On December 3, the figure was 29.3%; on December 18, 43.9%; on December 22, 51%; on December 23, 56.7% (Gov. Ex. 9, R. 1125, 108).[6] Moreover, not all eggs in

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per dozen more than refrigerator eggs in Chicago (Gov. Ex. 43, R. 1252, 1014), a difference which would amount to $1305 per egg futures contract.

During the 10-year period 1937-1946, only one carlot of fresh eggs was delivered out of a total of 1224 December contracts settled by delivery (Gov. Ex. 17, R. 1139, 166).

[6] On December 31, Great Western held at least 97.5% of the "deliverable" eggs remaining on hand (Gov. Ex. 10, R. 1126, 110). This, of course, is the typical aftermath of a corner.

Chicago storage were "deliverable" under the Exchange rules,[7] so that actually Great Western's cash eggs position was substantially larger than the above percentages would indicate.

It also appears that, out of a total of 55 carlots of eggs which were delivered in December 1947 (19 of which were redelivered), Great Western was the "ultimate stopper" of 53 carlots, that is to say, Great Western received and removed from circulation 53 of the 55 carlots which were delivered in satisfaction of December egg futures (Gov. Ex. 16, R. 1137, 1138, 161). Despite the steady increase in Great Western's cash eggs position during the month of December, the company sold only 7 carlots of cash eggs to Chicago buyers during the period December 10-December 23. None were sold to Chicago buyers during the crucial last days of December trading when Great Western liquidated its long futures contracts (Gov. Ex. 37, R. 1241-1245, 461). Dr. W. Edwards Beach, a qualified expert in the field of commodity trading, testified that, on the basis of the uncontroverted figures, Great Western had acquired and withheld from sale in Chicago a substantial part of the cash supply of refrigerator eggs available to shorts (R. 436, 358-359).

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[7] Some of the eggs were undeliverable because of their poor quality, and other eggs were stored in lots too small to qualify under the delivery rule (Gov. Ex. 11, R. 1127, 117, 1106-1107). The eggs stored in lots too small to qualify could not be combined with larger lots because of the rule that the lots "must be stored within a period of three business days and the entire unit must be delivered from the same warehouse" (R. 1107).

The record also shows that, from the close of trading on December 2, 1947, until the close of trading on December 22, 1947, Great Western's long December futures position was greater than the total stocks of refrigerator eggs in Chicago not owned by Great Western. During most of this period Great Western's long December futures position was 2 or 3 times larger than the total stocks of refrigerator eggs stored in Chicago. For example, at the close of trading on December 19, with only the last two trading days remaining, Great Western had long futures contracts calling for the delivery of 179 carlots of eggs, but there were in Chicago only 61 carlots of refrigerator eggs not owned by Great Western. From the close of trading on December 2 until the close of trading on December 22, the holders of a substantial number of short December contracts, ranging from at least 12 to 173 contracts, could not liquidate their contracts, save by adopting one of three courses: (1) Purchasing fresh eggs; (2) purchasing and delivering (prior to the last two days of trading) out-of-town refrigerator eggs and incurring the penalty incident thereto; (3) purchasing from Great Western (Gov. Ex. 8, R. 1124, 106). Dr. Beach concluded, on the basis of all of the statistical and economic data, that Great Western had cornered the December 1947 egg futures market (R. 325-335, 293-296).

During December 1947, Great Western was concededly engaged in a spread or straddle operation, *i.e.*, Great Western had a long December egg fu-

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tures position and a short January egg futures position, which depended for a profit upon a widening of the spread between the price of December 1947 and January 1948 egg futures contracts (R. 576-577, 560-561, 541-542, 48-50). In fact, the spread between the price of December 1947 and January 1948 egg futures contracts widened from 1.82¢ on December 1, 1947, to 8.12¢ on December 23, 1947, the last day of trading in December futures (Gov. Ex. 1, R. 1100, 96). Great Western realized a gross profit of $182,088 on the transactions involved in this case (Gov. Ex. 22, R. 1217, 272).

The synoptic table in Appendix B (*infra*, p. 22) shows various positions and transactions of Great Western, and the spread between the price of December 1947 egg futures contracts and January 1948 egg futures contracts on the Chicago Mercantile Exchange during the period from December 1, 1947, until December 23, 1947, the last day of trading in December futures. The graphic chart in Appendix C (*infra*, p. 23) illustrates the figures in columns 6 and 7 of the synoptic table, and shows the relationship between the percentage of the total long December contracts owned by Great Western and the spread between the price of December 1947 and January 1948 egg futures contracts.

The Court of Appeals found that the evidence sustained the findings that the prices of refrigerator eggs and December futures were abnormally high in December 1947 in relation to "(a) the price of January 1948 futures and (b) fresh eggs in

December 1947" (R. 1479). The normal price relationship between December and January futures is for December futures to be at a premium of less than 1½¢ over January futures during the final weeks of December trading (Gov. Exs. 27-30, R. 1231-1234, 456-458, 296-306). In 1947, December futures were at a premium of 5.94¢ over January futures at the close of trading in December futures (Gov. Ex. 28, R. 1232, 457). In addition, the change in the spread between the prices of December and January futures is normally not more than 1¢ during the last seven weeks of trading. In 1947 the change was 5.67¢ (Gov. Ex. 30, R. 1234, 458, 303-306).

Normally, the price of fresh eggs and the price of December refrigerator futures move in the same direction during the last week of trading in December futures, with the fresh egg price at a substantial premium over the refrigerator futures price (Gov. Exs. 31-32, R. 1235-1236, 458). However, in the last week of trading in December 1947, the price of fresh eggs was declining rapidly while the refrigerator futures price was increasing, so that on the last day of trading the refrigerator futures price was within ½¢ of the fresh egg price (Gov. Ex. 31, R. 1235, 458). Three days after the close of trading in December futures, the price of refrigerator eggs had declined from 53.50¢ per dozen (R. 1100) to below 46¢ per dozen (R. 1194), a drop of about 7½¢ per dozen.

ARGUMENT

The decision below, affirming the findings of fact by the Judicial Officer that petitioners had cornered the December 1947 egg market on the Chicago Mercantile Exchange, in violation of the Commodities Exchange Act, is clearly correct. The petition for a writ of certiorari, which, in effect, merely reargues the evidence, presents no question warranting review by this Court.

1. The undisputed facts establish that Great Western acquired and maintained, until the close of trading in December 1947 egg futures contracts, a large and controlling long position in December egg futures contracts on the Chicago Mercantile Exchange (see *supra,* pp. 6-10). This was fortified by substantial control of the available cash egg supply, *supra,* pp. 7-10. As a result of Great Western's market control, the shorts were unable to cover their contracts without settling at an artificially high price dictated by Great Western, *supra,* pp. 9-11. As the Court of Appeals stated (R. 1480), "a review of the entire record is convincing that the greater weight of the evidence sustained the Referee and Judicial Officer in their conclusion that petitioner Great Western had cornered the egg market on the Chicago Mercantile Exchange in December 1947." Accordingly, there is no basis for petitioners' contention (Pet. 20-21) that the court below did not properly consider the evidence,[8]

[8] There is, of course, no inconsistency between the opinion below and the Seventh Circuit's prior decision in *General Foods Corporation* v. *Brannan,* 170 F. 2d 220, 224, concerning the scope of judicial review.

nor for their contention that the evidence did not support the ultimate findings.

Certainly there is no merit in petitioners' suggestion (Pet. 21) that the court erred when it declared that in determining credibility of witnesses the hearing examiner had an advantage over a reviewing court. "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded." *United States* v. *Oregon Med. Soc.*, 343 U. S. 326, 339; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 495-496. *Accord: National Labor Relations Board* v. *Universal Camera Corp.*, 190 F. 2d 429, 430 (C. A. 2); *Ohio Associated Tel. Co.* v. *National Labor Relations Bd.*, 192 F. 2d 664, 668 (C. A. 6); *Jennings* v. *Murphy*, 194 F. 2d 35, 36 (C. A. 7); *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 490 (C. A. 2).

2. Petitioners particularly challenge (Pet. 10-12) the character of proof adduced by the Government to show that price manipulation actually occurred. The Court of Appeals concluded that the Government had proved the economic effects of petitioners' transactions by showing that the prices of refrigerator eggs and December futures were abnormally high, in December 1947, in relation to "(a) the price of January 1948 futures and (b) fresh eggs in December 1947" (R. 1479).

It is, of course, familiar doctrine that "the effect of the squeeze or corner upon prices" is to be found "in spreads between current-delivery and later-maturing options", and that the existence of an

abnormal price spread "affords a test of the existence of a corner." *Report of the Federal Trade Commission on the Grain Trade* (1926), Vol. VII, pp. 77, 245, 248.[9] The evidence showed clearly that petitioners, by their activities, succeeded in substantially widening the spread between December 1947 and January 1948 futures, *supra,* pp. 9-11. Further confirmation is found in the fact that, three days after the close of trading in December refrigerator egg futures, the price of refrigerator eggs tumbled 7½¢ per dozen. "The statistical evidence of a corner—and also the evidence that it serves no good economic purpose—is the prevalence at the close of the delivery month of markedly higher prices than in the days following * * *" *Report of the Federal Trade Commission on the Grain Trade* (1920), Vol. V, p. 323.

Equally significant was the proof that the price of December 1947 refrigerator eggs was abnormally high in relation to fresh eggs. As already noted (*supra,* p. 11), on the last day of December trading, refrigerator eggs were selling at a price only ½¢ per dozen less than fresh eggs. It requires little argument that the sudden and highly abnormal narrowing of a price gap between an allegedly cornered product and a more expensive substitute product is probative of the existence of a corner.

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[9] See, also, Working, "Price Relations Between July and September Wheat Futures at Chicago Since 1885" (in *Wheat Studies of the Food Research Institute,* Stanford University, Vol. IX, No. 6, March 1933, p. 211); Working, "Price Relations Between May and New-Crop Wheat Futures in Chicago Since 1885" (in *Wheat Studies of the Food Research Institute,* Stanford University, Vol. X, No. 5, February 1934, p. 184).

3. Petitioners have attempted to cloak their remaining factual arguments in the garb of questions of law, but analysis of these questions demonstrates clearly that they are either based on erroneous factual premises or are restatements of evidentiary arguments.

Thus, petitioners' question 1(b) (Pet. 2-3) omits the controlling facts that, under the Exchange delivery rule, out-of-town refrigerator eggs could not be delivered on or after the crucial last two days of trading during which Great Western liquidated the bulk of its large and controlling long position, and that if such eggs were delivered prior to the last two days of trading, the short was required to pay a penalty of about $315 per contract, *supra,* p. 6. Petitioners' question 1(c) (Pet. 3), relates to whether a corner exists if 52% of the shorts are not cornered. But in this case a majority of the shorts were cornered,[10] and petitioners' asserted question is not presented. Petitioners' question 1(d) (Pet. 3) relates to whether a corner exists "in the absence of withholding of the commodity by the alleged cornerer from the market, the *court* having made no finding of any withholding?" (Emphasis supplied.) But the Judicial Officer found, upon the basis of convincing

[10] The petitioners' reference to 52% of the shorts not cornered is based on the data for December 19 in Government Ex. 35 (R. 1239, 460), but those figures are based on the assumption that all refrigerator eggs in Chicago were deliverable under the Exchange rule (R. 330). Actually, about 20 carlots of refrigerator eggs in Chicago were not deliverable (Gov. Exs. 9 and 10, R. 1125-1126, 106-117), and therefore about 67% of the shorts were cornered at the close of trading on December 19, with only the last two days of trading remaining.

proof (see *supra*, pp. 6-10), that Great Western "withheld December futures *and* cash storage eggs from the market" (R. 1422; emphasis supplied). And the Court of Appeals held that the undisputed statistical proof "amply justified the conclusion that, subsequent to December 15, Great Western held a controlling position in the available cash supply of eggs deliverable on December futures contracts" (R. 1476), and that the evidence supported "findings that Great Western had (1) acquired and maintained a dominant 'long' position in December 1947 egg futures which it combined with (2) the purchase of a controlling interest in a substantial part of the available cash supply of December 1947 eggs * * *" (R. 1479).[11] Petitioners' argument (Pet. 9, 13-14, 17) as to whether a corner can exist without controlling the cash commodity, is obviously not presented on this record.[12]

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[11] The Court of Appeals held that the evidence sustained the finding that refrigerator eggs in Chicago were the only supply of eggs "available to the shorts for performance of their December 1947 obligations" (R. 1474-1475). This holding is consistent with the Court's prior holding in *General Foods Corporation* v. *Brannan*, 170 F. 2d 220, 228-229 (C.A. 7), where it was held that out-of-town rye must be considered in determining the *motive* of one of the petitioners involved in that case when he attempted to keep Winnipeg rye from the Chicago market. Also, in the case of May rye futures involved in the *General Foods* case, the shorts had at least a week after the close of trading within which to bring rye into Chicago for delivery (3 F. R. 418). In the case of refrigerator egg contracts involved in the case at bar, out-of-town refrigerator eggs could never be brought into Chicago for delivery, and they could not be delivered on the crucial last two days of trading or thereafter, *supra*, pp. 5-6.

[12] In *United States* v. *Patten*, 226 U. S. 525, 539-540, the Court stated that "counsel for the Government expressly conceded, that 'running a corner' consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1953.

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with the purpose of artificially enhancing the price, 'one of the important features of which,' to use the language of the Government's brief, 'is the purchase for future delivery, coupled with a withholding from sale for a limited time;' and as this definition is in substantial accord with that given by lexicographers and juridical writers, *we accept it for present purposes, although observing that not improbably in actual usage the expression includes modified modes of obtaining substantially the same end*" (emphasis supplied). It is not clear whether the Court was referring to a withholding of the cash commodity, as distinguished from a withholding of futures contracts, but in any event, the Court made it clear that the result achieved is the test of a corner, and not the method used to obtain a corner. The issue is manifestly not involved in the case at bar, but it is clear that a corner could occur without controlling any of the cash commodity. For example, if there were 1,000 egg futures contracts open on the Exchange, and only 100 carlots of eggs available for delivery, a corner could be effectuated by obtaining a controlling long position on the Exchange without controlling any of the cash eggs.

APPENDIX A

Statutory Provisions

The following sections of the Commodity Exchange Act are pertinent to this case:

Section 2 (a)

For the purposes of this Act * * * [t]he act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person. * * * [42 Stat. 998; 7 U.S.C. § 4.]

Section 3

Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodities and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; that such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodi-

ties and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of commodities on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodities and products and by-products thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodities and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein. [42 Stat. 999; 49 Stat. 1491; 7 U.S.C. § 5.]

Section 6 (b)

If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this Act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade, he may serve upon such person a complaint stating his charges in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all con-

tract markets until further notice of the Secretary of Agriculture refuse all trading privileges to such person, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. * * * Upon evidence received, the Secretary of Agriculture may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent fortwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith served upon the Secretary of Agriculture by delivering such copy to him, and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record

theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. [42 Stat. 1002; 49 Stat. 1498-1499; 62 Stat. 991; 63 Stat. 107; 7 U.S.C. § 9.]

Section 9

Any person who shall * * * manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner any such commodity * * * shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution. [42 Stat. 1003; 49 Stat. 1491, 1501; 7 U.S.C. § 13.]

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APPENDIX B

Date 1947	Great Western's Long December Position at Close of Trading on Dates Indicated 1/	Great Western's Short January Position at Close of Trading on Dates Indicated 1/	Great Western's Purchases of December Futures on the Dates Indicated 2/	Great Western's Sales of December Futures on the Dates Indicated 2/	Total Open Contracts in December Futures at Close of Trading on Dates Indicated 1/	Great Western's Percentage of Total Long December Futures at Close of Trading on Dates Indicated 1/	Price Spread Between Dec. 47-Jan. 48 Futures at Close of Trading on Dates Indicated 3/	Number of Short Contracts, at Close of Trading on Dates Indicated, which Could Not Be Liquidated without Resort to Great Western, Fresh Eggs, or Out of Town Refrigerator Eggs 4/
	(carlots) (Col. 1)	(carlots) (Col. 2)	(carlots) (Col. 3)	(carlots) (Col. 4)	(carlots) (Col. 5)	(percent) (Col. 6)	(cents) (Col. 7)	(contracts) (Col. 8)
Dec. 1	272	277	20	5	818	55.5	1.82	-
Dec. 2	292	295	28	8	740	59.5	3.22	12
Dec. 3	291	316	15	35	717	47.6	3.77	70
Dec. 4	287	297	0	30	641	42.7	3.77	64
Dec. 5	282	324	34	15	588	48.6	4.22	93
Dec. 6	282	298	1	37	554	50.9	4.12	98
Dec. 9	282	295	20	6	517	54.5	4.05	98
Dec. 10	291	315	16	17	509	55.2	4.20	110
Dec. 11	274	308	9	5	495	55.4	4.47	131
Dec. 12	272	308	1	2	470	57.9	4.50	140
Dec. 15	256	298	10	16	451	56.8	4.72	140
Dec. 16	256	257	1	21	405	63.5	5.40	126
Dec. 17	256	264	10	—	365	54.4	4.50	147
Dec. 18	221	189	—	6	356	65.0	5.00	142
Dec. 19	170	187	2	56	235	76.2	6.20	115 5/
Dec. 22	113	187	—	57	155	75.9	6.87	50 5/
Dec. 23	25	187	5	84	28	96.2	8.12	-

1/ From Government Exhibit No. 4 (R. 1117).

2/ From Government Exhibit No. 7 (R. 1125).

3/ From Government Exhibit No. 1 (R. 1100).

4/ From Column No. 6 of Government Exhibit No. 55 (R. 1259). These figures are based on the assumption that all refrigerator eggs in Chicago were deliverable under the Exchange rule, and the figures would be increased by the number of refrigerator eggs in Chicago which did not qualify under the Exchange delivery rule.

5/ Refrigerator eggs stored in warehouses outside of Chicago could not be delivered on the last two trading days, i.e., after 9:00 a.m. on December 22, 1947.

APPENDIX C

SPREAD BETWEEN CLOSING PRICES OF DECEMBER AND JANUARY EGG FUTURES, CHICAGO MERCANTILE EXCHANGE, AND PERCENTAGE OF TOTAL OPEN LONG CONTRACTS HELD BY GREAT WESTERN FOOD DISTRIBUTORS, INC., NOVEMBER 3 - DECEMBER 23, 1947